Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-743

ROYCE N. MOORE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Statement and Opinion Below 1

Questions Presented For Review 2

Statement of the Case 2

Reasons For Granting the Writ:

I. The hallway area outside of an apartment in a private residential building which provides doorman services as well as prior announcement of visitors is an area of expected privacy. The activity of narcotics officers designed to eavesdrop at an apartment door and to prevent the doorman from notifying the tenant that visitors are approaching her apartment is violative of the Fourth Amendment. 5

II. Where agents stationed themselves against an apartment door to eavesdrop, such a purpose was unlawful. If the agents are aware that their unlawful presence may be discovered, no exigency allowing for a warrantless entry should be assumed to have occurred when the occupants do discover their presence. Exigencies excusing resort to a warrant should not be presumed to exist if the precipitating conduct giving rise to the exigency is itself unlawful as was the unlawful eavesdropping which occurred in this case. 7

III. Warrantless eavesdropping accomplished by pressing of the ear against an apartment door to make the door a sounding board in order to amplify the words of the occupants within is violative of the Fourth Amendment. 8

Page

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Goldman v. United States, 316 U.S. 129 .....9, 10

Katz v. United States, 389 U.S. 347 (1967) 6, 9, 10

McDonald v. United States, 335 U.S. 451 10

United States v. Carriger, 541 F.2d 545 (6 Cir. 1976) 6

United States v. Case, 435 F.2d 766 (7th Cir. 1970) 6

United States v. Fisch, 474 F.2d 1071, cert. denied, 412 U.S. 921 (9 Cir. 1973) 8

United States v. Fluker, 513 F.2d 709 (9th Cir. 1976) 6

United States v. Jackson, 588 F.2d 1046 (5 Cir. 1979) 8

United States v. Penco, No. 78-1182, slip op. 4503, decided Sept. 6, 1979 6

Wong Sun v. United States, 371 U.S. 471 10

Statutes Cited:

21 U.S.C. §841 .....1, 2

28 U.S.C. §1254(1) 2

Page

United States Constitution Cited:

Fourth Amendment 2, 5, 6, 7, 8, 10

Other Authority Cited:

Searches and Seizures Arrests and Confessions, Clark Boardman, 1972, §321.01, pp. 408-40 9

APPENDIX

Appendix A — Judgment of the United States Court of Appeals for the Second Circuit 1a

In The

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No.

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STATEMENT AND OPINION BELOW

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on the 11th day of October 1979 (Appendix A) affirming his conviction on March 23, 1979, after a trial before Hon. Thomas P. Griesa, U.S.D.J., and a jury, in the United States District Court for the Southern District of New York. Petitioner was convicted upon a single count indictment charging possession of cocaine with an intent to distribute (21 U.S.C. §841) and was sentenced to a term of imprisonment for five (5) years and a special parole term of three years.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the hallway area of an apartment in a private residential building which provides doorman services as well as prior announcement of all visitors, an area of expected privacy? Does the activity of narcotics officers which was designed to eavesdrop at an apartment door and which involved acts meant to prevent the doorman from notifying the apartment occupants of the presence of the agents constitute a violation of the Fourth Amendment?

2. If the exigencies relied upon to support warrantless arrests and searches are caused by unlawful behavior of the officers, may the arrests and searches nonetheless be considered lawful?

3. Is warrantless eavesdropping violative of the Fourth Amendment where the means of intrusion is the officer's ear pressed against an apartment door in such a fashion as to amplify the quiet conversation taking place within the apartment?

STATEMENT OF THE CASE

Petitioner was indicted on September 19, 1978, in the United States District Court for the Southern District of New York upon a charge of possession of cocaine (a kilogram) with intent to distribute (21 U.S.C. §841). Petitioner was indicted for such possession along with two other defendants, Sheila Richardson and Michael Palmer. In a second count of the indictment, Richardson and Palmer alone were indicted for conspiracy to distribute cocaine. Petitioner was not indicted under the conspiracy count, but was named in such count as a co-conspirator.

Petitioner alone went to trial after a motion to suppress the evidence was denied as to all three defendants. Richardson and Palmer entered guilty pleas prior to trial and each received sentences of one year's imprisonment and special parole terms of three years. These defendants, like the petitioner Moore, are also petitioning for writs of certiorari.

Certiorari is sought now mainly to review the validity of the search and seizure conducted by several agents of the Drug Enforcement Administration who entered the hi-rise apartment of Richardson without a search warrant and found petitioner in a back bedroom near a gym bag containing nearly a kilogram of cocaine.

The background to the seizure and arrests started a few weeks earlier when an undercover agent of the DEA (Agent Glauner) discussed a cocaine "buy" from Palmer who showed a sample to Glauner. The matter was put off to August 21, 1978, when Agent Glauner arranged to meet Palmer on York Avenue at 89th Street in Manhattan to receive six ounces of cocaine in exchange for $10,000. The meeting, of course, was heavily surveilled by other agents. There, in Glauner's automobile, Palmer asked for the $10,000 as a pre-condition to delivery of the cocaine which he said was in an apartment nearby under the control of a "girl". Glauner, however, refused to part with any cash until Palmer produced the drugs. Palmer said he would go to the apartment in an effort to induce the "girl" to release the cocaine. Palmer left the vehicle and was trailed to a nearby luxury hi-rise apartment building at 1725 York Avenue where Palmer was admitted by the doorman and entered an elevator to go up to Apartment 18E, the residence of Sheila Richardson.

An agent of the DEA (Hall) entered the building behind Palmer and followed him upstairs to the 18th floor, after overhearing the doorman call up to Apartment 18E. Another DEA agent was left behind with the doorman to prevent him from giving any warning to Richardson, the occupant of 18E. On the

18th floor, Hall saw Palmer exit from Richardson's apartment and go down to the street to meet again with Glauner. Glauner induced Palmer to try again to get the adamant "girl" to release at least a portion of the cocaine to show good faith to Glauner before Glauner would part with the money.

Palmer was again followed up to the Richardson apartment; this time by two agents while a third agent stood guard over the doorman below. The agents went upstairs with the intention and purpose to listen in against the door of Apartment 18E. Agent Hall pressed his ear up against the door and was thus able to hear fragments of a conversation between Palmer and Richardson relating to Richardson's refusal to "let it" (the cocaine) out of the apartment until Palmer got the money from the 'customer' in the street. Finally, Agent Hall heard Richardson tell Palmer to advise the customer that they "pass" and there would be no deal.

Palmer opened the door to exit at which point the agents — without any search warrant — burst in, arresting the two in the foyer. When Richardson shouted to Agent Hall not to go to the back of the apartment — where he was then seemingly headed — Hall went to a rear bedroom where he found petitioner sprawled out on a bed, his feet hanging over a gym bag containing cocaine and near which bag there were two packets of white powder on the floor containing a total of about six ounces of cocaine.

In a second bedroom nearby — the bedroom of Richardson — cutting materials, cash, and a triple beam scale were found. When asked by the agents to "cooperate" against Palmer and Richardson, petitioner allegedly stated "that can be dangerous". The gym bag found near petitioner was traced, from a sales slip in petitioner's portfolio, to a sporting goods store in Michigan and a salesgirl from the store tentatively identified petitioner as the purchaser of the bag.

Petitioner testified that while the gym bag was his, the bag was not in his room at the time of the seizure and that the cocaine was not his. He denied making any incriminating statements and stated that Palmer's business card was put into his portfolio by the agents along with Palmer's driving license when the agents decided to use his folder as a collecting bag for papers recovered from all of the defendants.

REASONS FOR GRANTING THE WRIT

I.

The hallway area outside of an apartment in a private residential building which provides doorman services as well as prior announcement of visitors is an area of expected privacy. The activity of narcotics officers designed to eavesdrop at an apartment door and to prevent the doorman from notifying the tenant that visitors are approaching her apartment is violative of the Fourth Amendment.

In affirming petitioner's conviction, the Court of Appeals decided that the agents of the DEA had a right to be in the hallway near Apartment 18E and that probable cause existed to arrest the defendant Palmer when he opened the door to exit (Appendix A, 3a). The Court of Appeals also ruled that Palmer's emergence came as a "surprise" to the agents and that the ensuing warrantless arrests were, in effect, excused by the exigencies accompanying Palmer's opening the door without warning. The ensuing search in the apartment was viewed as incident to the arrests.

The decision of the Court of Appeals is in open conflict with the law as expressed in other circuits on the issue of the propriety of the officers' presence in an apartment building in an area very far removed from the lobby, and in a situation where the sentinel function of the doorman was deliberately thwarted by the officers who immobilized him in order to prevent any forewarning to the occupants of Apartment 18E.

While the Court of Appeals cites its own decision in *United States v. Penco*, No. 78-1182, slip op. 4503, decided Sept. 6, 1979, as approving the presence of officers in the "common areas" of an apartment building, the Second Circuit completely ignores the fact that the provision of a doorman to announce visitors to a tenant is a service bargained and paid for by the occupants of the building as a means to ensure their privacy. The perimeters of the tenant's sphere of privacy are extended to all areas of the building appurtenant to his apartment precisely because the doorman is charged with a duty to exclude uninvited guests and to warn of approaching visitors. This privacy concept as it relates to so-called common areas in a multiple dwelling is specifically recognized in *United States v. Fluker*, 513 F.2d 709 (9th Cir. 1976); *United States v. Case*, 435 F.2d 766 (7th Cir. 1970) and *United States v. Carriger*, 541 F.2d 545 (6 Cir. 1976). Especially interesting in this respect is former Judge Wade McCree's opinion in *Carriger* which recognizes the privacy entitlement pertaining where tenants in multiple dwellings contract for, and receive, security services as a part of their tenancy. The Second Circuit decision in this case is thus clearly at odds with the law as expressed in at least three other circuits.

Moreover, in a metropolitan area ridden with crime, such as New York City, it denigrates the status of the apartment dweller to define the limits of his privacy to the walls within his lodging and not even to the outer surfaces of those walls. Such a view of the Fourth Amendment reduces to naught the legitimate expectations of privacy which a tenant in a doorman-guarded building should be allowed to enjoy [*see Katz v. United States*, 389 U.S. 347 (1967)].

II.

Where agents stationed themselves against an apartment door to eavesdrop, such a purpose was unlawful. If the agents are aware that their unlawful presence may be discovered, no exigency allowing for a warrantless entry should be assumed to have occurred when the occupants do discover their presence. Exigencies excusing resort to a warrant should not be presumed to exist if the precipitating conduct giving rise to the exigency is itself unlawful as was the unlawful eavesdropping which occurred in this case.

The Second Circuit's opinion in this case also misconceives the extent to which exigent circumstances should be permitted to overcome the rule proscribing warrantless entries into the home. In the instant case, the officers knew in advance that Palmer would certainly be exiting Apartment 18E in a few moments because it was imperative that he return to Agent Glauner's car. In this situation, Palmer's emergence could hardly be termed a "surprise" to the agents sufficient to vitiate normal Fourth Amendment standards. The officers, however, deemed it vital throughout to eavesdrop against the door of Apartment 18E. It is this feature of their illegal conduct which caused them to be present when Palmer opened the door. Of course, it was in this 'self-imposed' situation, steeped with their purpose to eavesdrop, that the agents were discovered by Palmer and Richardson, and an arrest became well-nigh inevitable. But this argument, based as it is on the patently false premise of "surprise" and the consequent self-generated "exigency" of being discovered during the course of theic own *improper* listening against the door, should not be allowed to validate what would otherwise be an improper arrest and lawless entry into Apartment 18E. The purpose to listen in and the arrests were factually intertwined. It was clear error for the Court of Appeals to isolate the question of the legality of the presence in the 'common' hallway from the more encompassing and supervening question of what the officers had come to do, and actually did; that is, to listen in against the apartment door.

For this reason, it is utterly disengenuous for the court below, in one breath, to ratify the arrests and search which took place in this case and to say that the issue of the propriety of eavesdropping against the door need not be confronted or decided. The deep flaw of the opinion below is that the lawless purpose to listen in by eavesdropping was the very reason that the officers were in the hallway in the first place, and at the apartment door. If that purpose was unlawful, it necessarily infected the presence of the agents in the hallway and their presence there could not be constitutionally validated by the wafer thin logic that anything at all is constitutionally permissible in the common areas of an apartment building. Even though the Second Circuit opinion herein seemingly avoids the eavesdropping issue, that very issue is decisive of the validity of the presence of the agents outside of Apartment 18E. It is an issue which cannot be avoided and is therefore now before this Court notwithstanding the expressed view below that this issue need not be decided on the facts of this case.

III.

Warrantless eavesdropping accomplished by pressing of the ear against an apartment door to make the door a sounding board in order to amplify the words of the occupants within is violative of the Fourth Amendment.

The eavesdropping against the door to Apartment 18E was violative of the Fourth Amendment. One's right of privacy is not lost when one speaks in normal tones in his own apartment so that the sound of speech from within can *only* be heard by utilizing the hallway door surface as a sounding board to amplify the interior sounds. The expectation of privacy attaching to the occupancy of a private apartment is measurably greater than what a transient tenant in a motel or a hotel could, or should, expect [*see United States v. Jackson,* 588 F.2d 1046 (5 Cir. 1979); and *United States v. Fisch,* 474 F.2d 1071, *cert. denied,* 412 U.S. 921 (9 Cir. 1973)].

It is also of special import that our position on this application is specifically supported in the treatise of Judge Ringel: *Searches and Seizures Arrests and Confessions,* Clark Boardman, 1972, §321.01, pp. 408-40. Thus, Judge Ringel writes, at p. 409, respecting overheard statements by "naked ear" that:

> "*Katz* [389 U.S. 347] was a 'bugging case'. It raised questions involving curtilage among others. *Thus, if a police officer put his ear to a closed door leading* to a private office or *apartment,* and in this manner overheard conversations pertaining to the commission of a crime, *his act under Katz might constitute an invasion of privacy vitiating the arrest. Wong Sun v. United States,* 371 U.S. 471, *People v. Rodriguez,* 11 N.Y. 2d 279. On the other hand, if the overheard conversations were in a voice loud enough to be heard outside of the closed foor and without putting an ear to the door, there would be no 'expectation of privacy' and no violation of the rule in *Katz*". (Emphasis added.)

In the instant case, Agent Hall could not hear what was being said inside Apartment 18E without pressing his ear to the door. Even then, he could not hear every word uttered through the steel apartment door (H65). Some of the conversation "wasn't clear to me" (H65). The occupants were *not* talking loudly (H145). (The foregoing are references to the hearing minutes.)

In our appraisal of the "reach" of the *Katz* case, it should not be ignored that *Katz* forthrightly overruled *Goldman v. United States,* 316 U.S. 129. In *Goldman,* the offending "ear" was a detectaphone pressed against the wall adjoining the defendant's office through which wall the sound of defendant's

voice was picked up and amplified. The wall became a sounding board. Since there has been no "trespass" in *Goldman,* the 1941 Supreme Court narrowly sustained the eavesdropping. In the *Katz* case, however, the "trespass" concepts espoused in *Goldman* were laid to rest and completely "discredited" [(Katz v. United States, 389 U.S. 347, 352-3 (1967)]. In *Katz,* the Supreme Court took note that "what [a person] seeks to preserve as private, even in an area accessible to the public [such as a glass telephone booth], may be constitutionally protected." Under this test, the conduct at issue in *Goldman,* although not involving a physical penetration or intrusion into a room, was considered by the *Katz* Court to be violative of the right of privacy under the Fourth Amendment. The overruling of *Goldman* by the *Katz* case, thus, illustrates beyond any serious argument that the straining effort of Agent Hall to hear through a door what was otherwise meant to be private, is violative of the Fourth Amendment (*see also, McDonald v. United States,* 335 U.S. 451, 458-9).

The legitimate expectation of privacy that those in Apartment 18E were entitled to have was deliberately breached in this case (*Katz v. United States, supra*). The overheard remarks became the alleged basis for probable cause to enter and arrest the speakers within. The gaining of information by such illegal eavesdropping tainted the factual basis upon which the agents proceeded and condemns not only the arrests but the subsequent search of the apartment (*Wong Sun v. United States,* 371 U.S. 471).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell
Attorney for Petitioner

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of October, one thousand nine hundred and seventy-nine.

Present:

HONORABLE STERRY R. WATERMAN

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. TIMBERS

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

- against -

ROYCE N. MOORE, MICHAEL PALMER, and SHEILA RICHARDSON,

Defendants-Appellants.

79-1137
79-1156
79-1157

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was submitted by counsel for appellant Moore and argued by counsel for the other appellants and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from judgments of conviction by Royce Moore, after a jury trial before Judge Griesa, and by Michael Palmer and Sheila Richardson, after guilty pleas. Appellant Moore was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A). Appellant Richardson was convicted of the same offense and appellant Palmer was convicted of conspiracy to violate the same substantive sections. Appellants Richardson and Palmer pleaded guilty after Judge Pollack, in an opinion dated January 26, 1979, denied their motion to suppress certain evidence obtained at the time of their arrest.

Appellants argue that their motion to suppress should have been granted because the entry of DEA agents into Richardson's apartment building violated their Fourth Amendment rights. But under our recent decision in United States v. Penco, No. 78-1182, slip op. 4503 (2d Cir. Sept. 6, 1979), where government agents enter peaceably, as they did here, the Fourth Amendment is not offended by their presence in common areas of apartment buildings, such as stairways or hallways. That the apartment building here was guarded by a doorman does not distinguish this case from *Penco*, for the apartment building in that case was staffed with both a doorman and an elevator operator.

Appellants also argue that their Fourth Amendment rights were violated because one of the DEA agents pressed his ear to the door of Richardson's apartment in order to overhear a conversation between Richardson and Palmer. But we need not reach this question because there was ample probable cause to arrest appellants even absent the overheard conversation. Palmer told the DEA agent with whom he was negotiating that the "source" of his cocaine was a woman; during the course of the protracted negotiations, other agents followed Palmer twice to Richardson's apartment, having been told the first time by the doorman that the apartment belonged to Richardson; and, finally, when the door opened, Richardson was found standing next to Palmer. The totality of circumstances here would warrant a prudent man in believing that Richardson was the source of which Palmer spoke. Since Palmer was a "participant in the very crime in issue," his "past reliability" did not have to be shown. Cf. United States v. Dunloy, 584 F.2d 6, 10 (2d Cir. 1978). There was more than sufficient probable cause for the arrest of the other two appellants.

We likewise reject appellants' contention that, even if there was probable cause, the arrests were unlawful in that the government agents failed to secure an arrest warrant prior to entering the apartment. There were exigencies here justifying a warrantless arrest after appellants surprised the agents by suddenly opening the door of Richardson's apartment. See United States v. Campbell, 581 F.2d 22, 27 (2d Cir. 1978).

We also think that the search and seizure of evidence from the apartment was lawful in that it was incident to the arrests. See Chimel v. California, 395 U.S. 752 (1969). At the suppression hearing, the agents testified that the objects seized were discovered in "plain view" during the course of a security check of the apartment. Such checks are legitimate, see, e.g., United States v. Christophe, 470 F.2d 865, 869 (2d Cir. 1972), cert. denied, 411 U.S. 964 (1973), and Judge Pollack credited the agents' testimony. See United States v. Campbell, supra, 581

F.2d at 28. Moreover, the prosecutor represented before Judge Griesa that when the guilty pleas were taken from Richardson and Palmer, the prosecutor had told their attorneys that the government would not offer into evidence objects the agents found within bags in the closets of the apartment — a gun and mannite — and in fact the government did not so offer those items at Moore's trial.

Appellant Moore raises several issues with regard to his trial. First, he argues that there was insufficient independent, non-hearsay proof that he was involved in a conspiracy to justify admitting into evidence the statements and acts of his alleged co-conspirators. We find that a fair preponderance of the independent evidence demonstrates Moore's involvement in the conspiracy; particularly telling is the evidence that Richardson attempted to warn Moore of the agents' presence and the evidence that Moore was discovered in close proximity to precisely the amount of cocaine that was to be sold to the DEA agent. Appellant Moore's contention that Judge Griesa failed to properly administer the test of United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), is not borne out by the record.

Moore also argues that the trial court erred in refusing to charge simple possession of cocaine as a lesser included crime. But the only factual issue in dispute at trial — whether Moore had posession of the cocaine — was the same for the greater and lesser offense. Accordingly, a lesser included crime charge was not called for. See United States v. Busic, 592 F.2d 13, 23-25 (2d Cir. 1978). Moreover, the amount of cocaine involved (a kilogram) was so great as to justify the inference that the cocaine was for distribution, not mere possession. See United States v. Mespoulede, 597 F.2d 329, 333 (2d Cir. 1979). Finally, appellant Moore contends that the trial court's instructions relating to constructive possession were so unfairly skewed towards the government's case that the jury virtually was required to convict. We believe that, read as a whole, the instructions were balanced.

Moreover, Judge Griesa's constructive possession charge was proper even standing by itself, for it simply allowed a conclusion of possession if the jury found certain facts.

We have considered all of appellants' arguments and they are without merit. The judgments of conviction are affirmed.

s/ Sterry R. Waterman
STERRY R. WATERMAN

s/ Wilfred Feinberg
WILFRED FEINBERG

s/ William H. Timbers
WILLIAM H. TIMBERS
Circuit Judges